

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BAYER HEALTHCARE PHARMACEUTICALS, INC.,	:	Case No. 2:10-cv-02734-CCC-JAD
Plaintiff,	:	
vs.	:	Newark, New Jersey
BIOGEN IDEC, INC.,	:	Thursday, January 10, 2013
Defendant.	:	10:10 a.m.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JOSEPH A. DICKSON
UNITED STATES MAGISTRATE JUDGE

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1 (Conference commenced at 10:10 a.m.)

2 THE COURT: All right. This is Bayer versus Biogen,
3 or the In re Biogen Patent Litigation, Docket Number 10-2734.
4 We're here for a status conference.

5 ||| Can we have appearances, please?

6 MR. MARINO: For Biogen, Your Honor, Kevin Marino,
7 Marino, Tortorella and Boyle. And with me at counsel table,
8 our lead counsel, Nicholas Groombridge of Paul Weiss.

THE COURT: Okay.

10 MR. GOODMAN: For Bayer, Bob Goodman from Greenbaum,
11 Rowe, Smith and Davis, with David Berl and Bruce Genderson
12 from Williams and Connolly.

13 THE COURT: Okay.

14 MS. McSHANE: Sheila McShane of the Gibbons firm.
15 With me are Wayne Barsky and Timothy Best of the Gibson Dunn
16 firm on behalf of EMD Serono and Pfizer. And on behalf of
17 Novartis; myself, as well as Leslie Morioca from the White and
18 Case firm.

19 THE COURT: Okay. All right. The first thing that
20 we have to talk about -- and it's going to be a short
21 discussion -- is I did -- Judge Cecchi and I have received I
22 guess three letters over the last few days seeking permission
23 to file a partial summary judgment motion prior to the close
24 of expert discovery. Judge Cecchi sent word over late last
25 night the answer is no. Okay?

Colloquy

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1 So, I read the letters. I understand the issues now.
2 But, when I read the letters again this morning, color me
3 optimistic, but do these arguments in any way allow us to
4 start to talk about settlement?

5 MR. GROOMBRIDGE: Your Honor, on behalf of the
6 plaintiffs, our view is no. I mean, our view, quite frankly,
7 is that this issue boils down to the problem that Serono,
8 which is one of the defense groups, has an option --

9 THE COURT: Right.

10 MR. GROOMBRIDGE: -- to take a license.

11 THE COURT: Right.

12 MR. GROOMBRIDGE: They can either exercise that
13 option going forward or not. Right? But they can't have it
14 both ways by saying I want to take a swing at your patent and,
15 if I lose, then I'll exercise my option.

16 And the practical effect of that, Your Honor, is that
17 the run rate at which they are racking up liability before
18 they exercise is enormously affected by this. So, if they
19 exercise the option, they're paying three percent. But, in
20 our view of the world, if -- as long as they don't exercise
21 the option, they're probably paying something like 85 percent.

22 And so the issue is that there is a huge disparity
23 between the -- our view of the world, in terms of what their
24 exposure is, and their view of the world. And, you know, all
25 I can say, I think, Your Honor, is that on the Biogen side,

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1 throughout the pendency of this lawsuit and, frankly, from the
2 day the patent issued -- now a little over three years ago --
3 we're surprised that they didn't exercise the option. We're
4 kind of, you know, why are we here? Right? Why would a
5 rational businessperson do this?

6 But the point is that they have now accumulated a
7 very substantial exposure under our lost profits theory that
8 runs literally into the billions of dollars. And so, the
9 problem with settlement is you -- you know, it -- the am -- it
10 very -- the amount of money that they would have to put on the
11 table, in view of that exposure, is something that is, I
12 suspect, not what they're going to be interested in doing.

13 So, we have a kind of --

14 THE COURT: That's from your perspective.

15 MR. GROOMBRIDGE: Yes.

16 THE COURT: But that's the same issue that mediators
17 and -- confront all the time. Because they're going to turn
18 around and say, first of all, you're wrong on the
19 retroactivity or on the -- on applying the agreement; and,
20 second of all, your patent is invalid.

21 MR. GROOMBRIDGE: Well, that -- and, Your Honor, let
22 -- just let me be clear. Biogen would be very happy to
23 mediate this issue.

24 THE COURT: Mm-hmm.

25 MR. GROOMBRIDGE: You know, we are quite confident in

Colloquy

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1 our position. So, to the extent -- I mean, I may have
2 misunderstood Your Honor's question. If the question is, is
3 there some value in sending this off to a supervised --

4 THE COURT: That's my question.

5 MR. GROOMBRIDGE: Our answer is, we'd be totally
6 happy to engage in that, because the prospect -- the
7 alternative is probably at least another year-and-a-half
8 before we get to trial. And, you know, absolutely we'd love
9 to do that.

10 MR. BARSKY: Your Honor, on behalf of EMD Serono and
11 Pfizer; Wayne Barksy, Gibson Dunn. Good morning.

12 THE COURT: Good morning.

13 MR. BARSKY: We're always willing to have reasonable
14 business discussions. We have tried it in the past; it hasn't
15 worked.

16 THE COURT: Mm-hmm.

17 MR. BARSKY: We have a very long contractual
18 relationship with Biogen. That was the subject of the
19 arbitration --

20 THE COURT: Right.

21 MR. BARSKY: -- in this matter a year ago. And,
22 actually, the issue that Mr. Groombridge just suggested --
23 namely, this notion that we could not somehow challenge the
24 patent and then later take the -- or exercise the option to
25 take the license -- is exactly the issue that was arbitrated,

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1 because Biogen took the position we could not do so, and they
2 lost on that issue in the unanimous and opinion of the
3 arbitral panel. So, that issue has already been decided.

4 But to the Court's question regarding whether the
5 existence of this issue perhaps opens a door. Well, I think
6 the Court just heard -- and I do have to agree -- that the
7 parties are very far apart. And hearing the plaintiffs say
8 that this is an issue where they think they have a claim for
9 billions of dollars of exposure is something that is going to
10 make it very difficult to have any reasonable discussion.

11 And so, at this point, we are always willing to speak
12 to our contractual partner, but I think we just heard from
13 Biogen that the likelihood is not high that those discussions
14 would be fruitful.

15 And I understand the Court's ruling on the issue of
16 the filing of the motion, and not -- I didn't hear any
17 daylight there, so I won't try to explore it, but I do have a
18 question for the Court. And that is, can we assume that we
19 can file that motion at the close of discovery or would the
20 Court prefer that we wait until a later time?

21 THE COURT: Well, I haven't spoken directly to Judge
22 Cecchi about that.

23 You have?

24 THE CLERK: (Indiscernible)

25 THE COURT: Okay. All right. Well, it appears that

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1 you're going to be able to file it at the close of expert
2 discovery.

3 MR. BARSKY: At the close of expert discovery.

4 THE COURT: But it is Judge Cecchi's practice to
5 explore -- maybe with a little bit more vigor than I am
6 exploring it today -- the possibility of settlement. And, in
7 fact, it's -- she's not unknown for actually ordering the
8 parties to go to mediation prior to dispositive motions. So,
9 I'm not saying that she's going to do that; I'm saying you
10 should prepare for that type of process.

11 And that's why -- one of the reasons I'm thinking, if
12 -- are we -- we are definitely finished with fact discovery in
13 about two weeks; correct? Or no?

14 MR. BARSKY: It looks like there is an agreement.

15 I'll defer to Mr. Berl and Mr. Groombridge, but -- but it
16 looks like there is an agreement to push out discovery by just
17 another six weeks, with the Court's agreement, so that we can
18 finish the 20 or so days of deposition that perhaps are left.

19 THE COURT: When I -- I -- yeah. Of course, we'll --
20 we can deal with that. But, at the end of the fact discovery
21 -- and I -- and I'm not -- I don't mean to be totally naive
22 about what you both just told me, but I think that it is
23 something that Judge Cecchi is going to want to explore
24 anyway.

25 So then, I guess my followup question is, from your

Colloquy

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1 perspective, would it be better to explore it after expert
2 discovery or now, after fact discovery?

3 MR. BARSKY: I think it would be helpful, Your Honor,
4 in my view, to explore it at a time when the issues are all
5 briefed for the Court. Because, as we indicated in our
6 correspondence, we do believe it's a straightforward
7 application of existing law, with no underlying contested
8 facts. And we understand that Biogen disagrees with that and
9 they think a different --

10 THE COURT: Mm-hmm.

11 MR. BARSKY: -- set of rules applies, and that's what
12 courts decide.

13 Perhaps, when those issues are framed, and on paper
14 and before the Court, that will be a good time to have -- at
15 least for our clients' purposes -- to have that discussion.

16 MR. GROOMBRIDGE: Your Honor, I think the way we
17 would look at that is to say that discussion is likely to be
18 more fruitful after the parties have gone through expert
19 discovery, because they will have created damages' expert
20 reports and have a sense of the strengths and weaknesses of
21 one another's positions. And so, while we're certainly
22 interested in having a dialogue, we think it's going to -- my
23 fear is that, if we did it today, it would just be two ships
24 passing in the night, you know, and pretty it would be --

25 THE COURT: You're both in agreement, and I --

Colloquy

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1 MR. GROOMBRIDGE: -- what we're hearing now.

2 THE COURT: -- and I got it.

3 MR. GROOMBRIDGE: Right. Right. Yeah. Mm-hmm.

4 THE COURT: I got it.

5 Okay. So then, let's do this. Six weeks is what
6 you're looking for, for fact discovery?

7 MR. BERL: Yes, Your Honor.

8 THE COURT: Which is? Help the mathematically-
9 challenged.

10 MR. BERL: We have said March 15th is what we --

11 THE COURT: March 15th?

12 MR. BERL: -- have agreed to.

13 And the other issue -- Your Honor, this is David Berl
14 for Bayer -- what has prolonged fact discovery to some extent
15 has been difficulty in scheduling depositions and getting them
16 on the calendar. So, we would request, and the parties have
17 all agreed to include perhaps in the order that, within the
18 next two weeks, all depositions would be calendared and a date
19 will be provided for them, so that we can assure that we'll
20 meet the March 15th deadline and not need to come back to the
21 Court.

22 MR. GROOMBRIDGE: Your Honor, if -- I have one
23 footnote perhaps to that. That one of the witnesses that they
24 wish depose is a gentleman named Walter Gilbert, a Nobel Prize
25 winner, whose time is rather difficult to get. And so, I

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1 think we have an agreement that he would be outside this
2 ruling. I don't know that the Court needs to put anything
3 about that in an order, as long as we get it on the record
4 here.

5 THE COURT: Okay. And in terms of what -- I'm sorry,
6 sir; your name? You.

7 MR. BARSKY: Wayne Barsky.

8 THE COURT: You're Bar --

9 MR. BARSKY: From Gibson Dunn.

10 THE COURT: Yeah, yeah. Thank --

11 MR. BARSKY: Thank you.

12 THE COURT: In terms of what you were saying, I don't
13 disagree with you that sometimes it's easier or it makes it
14 more educated to begin. I'm just going to give you a heads up
15 on that issue. You guys practice all over the country. We
16 have a six-month calendar here; a motion calendar. What Judge
17 Cecchi will not want to do is go beyond that six months for
18 the motions.

19 So, what I'm -- where I'm going with this, is perhaps
20 we finish fact discovery, we begin expert discovery. Maybe we
21 get together sometime in the middle of that if we need to,
22 just to talk about how things are going. And then, at the end
23 of expert discovery, we discuss a briefing schedule. We used
24 to have an Appendix N, I think it was, here in New Jersey in
25 our local rules that allow the parties to brief everything,

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1 exchange it, and then file it at a date -- usually it was
2 picked by the rule, but we could do that. And maybe even that
3 -- you can serve those papers to the mediator, as well, --

4 MR. BARSKY: Sure.

5 THE COURT: -- if I assume that you will want an
6 outside mediator.

7 MR. BARSKY: Sure.

8 THE COURT: But that's something -- but let's
9 remember to talk about that.

10 MR. BARSKY: Certainly, Your Honor. And just by way
11 of context? Under the current schedule, meaning before even
12 an order is entered today, --

13 THE COURT: Mm-hmm.

14 MR. BARSKY: -- the earliest time at which expert
15 discovery would commence -- I believe this is right -- is
16 sometime in May. If, by discovery, we mean the taking of
17 depositions of experts, as opposed to exchange of expert
18 reports.

19 THE COURT: When did -- what are the dates for the --
20 what are our current dates for exchanging of expert reports?

21 MR. GROOMBRIDGE: Your Honor, sir, the -- the current
22 schedule is that expert -- initial round of expert reports
23 would begin either the later of 60 days after the close of
24 fact discovery or 60 days after the entry of a Markman order.

25 THE COURT: Did you get the Markman order yet?

Colloquy

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1 MR. GROOMBRIDGE: We did not, Your Honor. And with
2 the utmost diplomacy, one of the things that we have hoped we
3 might elicit would be perhaps when -- when might be reasonable
4 to -- to expect that.

5 THE COURT: I will try to use that same diplomacy
6 myself and figure -- and see if we can -- if we can find out.

7 MR. GROOMBRIDGE: The -- so, it's 60 days after
8 Markman or close of fact discovery, and then it -- there's a
9 staged exchange of reports, and then depositions. It adds up
10 to a total of about seven months for the whole process. Which
11 is --

12 THE COURT: Do we still need that much time?

13 MR. GROOMBRIDGE: The dialogue -- and in fairness to
14 my colleagues here, this issue has come up a number of times.
15 Biogen's view is that it would prefer to condense it. I
16 believe the defendants are of the view that they do need that
17 time.

18 THE COURT: All right. Well, I guess we leave that
19 in place for now, and then maybe we should speak again in late
20 March or early April?

21 MR. BARSKY: Certainly, Your Honor.

22 THE COURT: And --

23 MR. BARSKY: Would it be helpful to the Court for
24 counsel to confer after today and propose alternate dates for
25 the Court to speak with us?

Colloquy

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1 THE COURT: Sure.

2 MR. BARSKY: All right.

3 THE COURT: Because I'm going to be fairly free or my
4 calendar is probably not totally booked for early year.

5 MR. BARSKY: Okay. We'll do that, Your Honor.

6 THE COURT: I'm just trying to think. I guess
7 there's nothing else to do about this right now.

8 Were there any other issues?

9 MR. GROOMBRIDGE: No other issues from Biogen, Your
10 Honor. I -- the -- we have a pretty cooperative relationship.
11 I think we're, I think, confident that we can work out what
12 remaining issues there are with fact discovery. So, our
13 expectation is that, come March 15th, we'll be all done,
14 without any intervention by the Court.

15 MR. BERL: Same with Bayer, Your Honor.

16 THE COURT: Okay. It's a pleasure to see people get
17 along when they're -- one side wants a billion dollars from
18 the other.

19 But, all right. Thank you very much.

20 MR. BARSKY: Thank you, Your Honor.

21 MR. GROOMBRIDGE: Thank you, Your Honor.

22 MR. BERL: Thank you, Your Honor.

23 MR. BARSKY: Appreciate the time.

24 THE COURT: You'll -- somebody will call us with a
25 date? Or a couple of dates. Give me about two dates, if you

Colloquy

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1 can, so I can pick.

2 MR. BERL: We shall do so.

3 THE COURT: Okay.

4 MR. BERL: It would be most convenient to call the
5 deputy clerk or to send a letter?

6 THE COURT: The law clerk.

7 MR. BERL: The law clerk. I shall do so.

8 THE COURT: Christina Martinez.

9 MR. BERL: Thank you very much, Ms. Martinez.

10 THE COURT: Okay.

11 MR. BERL: Thanks, Your Honor.

12 THE COURT: Yeah.

13 MR. BERL: Thank you, Your Honor.

14 MS. McSHANE: Would Your Honor like a proposed order?
15 You want to -- can work it that way?

16 THE COURT: On the -- you want it on the fact
17 discovery?

18 MS. McSHANE: For the close of fact discovery and --

19 THE COURT: Sure.

20 MS. McSHANE: -- you know, the terms there. Okay.

21 THE COURT: Sure. Thank you.

22 MS. McSHANE: We'll get that to you.

23 THE COURT: Okay. Thank you very much.

24 MR. BARSKY: Thank you, Your Honor.

25 (Conference adjourned at 10:26 a.m.)

C E R T I F I C A T I O N

2 I, TERRY L. DeMARCO, court-approved transcriber,
3 certify that the foregoing is a correct transcript from the
4 electronic sound recording of the proceedings in the above-
5 entitled matter from 10:10:29 a.m. to 10:26:14 a.m.

6

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Date

S / Terry L. DeMarco

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